APR 2) 1955
HAROLD B. WILLEY, Cl

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 758

NATIONAL AIRLINES, INC.,
Petitioner,

v.

THELMA SCHOLNIK,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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April 26, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. .....

NATIONAL AIRLINES, INC.,
Petitioner,

v.

THELMA SCHOLNIK,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered February 4, 1955, in cause No. 12,170 on the docket of said court, wherein the Court of Appeals:

1. *Reversed* the judgment of the United States District Court for the Northern District of Ohio, which had dismissed respondent's diversity suit on the ground petitioner, National Airlines, Inc., was not doing business in Ohio and was not there subject to suit for an accident occurring in Florida.

2. *Held* the rule applied by this Court in "analogous cases involving connecting railroad carriers," *Green v. Chicago, Burlington and Quincy Railway Company* (1907), 205 U. S. 530, and *Philadelphia & Reading Railway Company v. McKibbin* (1917), 243 U. S. 264, "has been materially changed by

later decisions of the Supreme Court," and is "no longer a correct statement of the law."

This Court has never overruled, confined, or modified *McKibbin* and *Green*. Whether, in view of *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310, those decisions are still to be followed, is a point on which the district courts are in disagreement. Like Swiss guards they may be found fighting on both sides of the question.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio (by Judge Jones) has not been reported; it is printed in the appendix hereto, page 17.

The opinion of the Court of Appeals for the Sixth Circuit (Judge Miller writing the opinion, concurred in by Judges Allen and McAllister), printed in the appendix, page 22, is reported in 219 F. 2d 115.

JURISDICTION.

The judgment presented for review is dated, and was entered, February 4, 1955. Rehearing was not sought.

This Court has jurisdiction under 28 U. S. C. § 1254-(1) to review by writ of certiorari upon petition therefor filed within the 90 days specified by 28 U. S. C. § 2101(c).

QUESTIONS PRESENTED.

The case brings for review the questions:

1. Whether the court below erred in holding this Court's decisions in *Green v. Chicago, Burlington and Quincy Railway Company* (1907), 205 U. S. 530, and *Philadelphia & Reading Railway Com-*

pany v. McKibbin (1917), 243 U. S. 264, are no longer law.

2. Whether an airline, having no authorization by the Civil Aeronautics Board for flights into or through Ohio, operating no planes into or through that state, having never qualified to do business in Ohio, and maintaining no office, property, or employees in that state, is doing business in Ohio and subject to the jurisdiction of a federal court in that state in a tort action arising in Florida, merely because it leases aircraft and flight crews to a connecting carrier for through flights and the connecting carrier solicits business and sells tickets in Ohio good on the lessor airline's out of state lines.

3. Whether the District Court's finding that such lessor-airline did not have contacts with the state of the forum to support jurisdiction is entitled to the same credit as findings under Rule 52 of the Federal Rules of Civil Procedure which are not reversible absent clear error.

STATUTES APPLICABLE.

The Fifth Amendment to the Constitution of the United States says:

"No person shall * * * be deprived of * * * property, without due process of law; * * *."

28 U. S. C. § 1391(c) provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

STATEMENT OF CASE.

Respondent, a passenger aboard a National Airlines plane, on a flight from Havana, Cuba, to Miami, Florida, says she was injured when, by reason of the airline's asserted negligence in the operation of the plane "she was thrown out of her seat into the aisle." (Tr. 5a, 6a.)

The accident happened "after said airplane had reached a point in Florida." (Tr. 5a.)

Suit was brought in the United States District Court for the Northern District of Ohio on diversity grounds, National being a Florida corporation and respondent a citizen of Ohio. (Tr. 5a, 9a.)

Summons was served upon National by serving Capital Airlines, Inc. (Tr. 7a), a separate, unrelated corporation (Tr. 9a), and by running a later summons (Tr. 20a) to the pilot of a plane owned by National Airlines when it touched at the Cleveland airport while operated by Capital under lease from National. (Tr. 46a.)

The District Court quashed service and dismissed the suit. (Tr. 52a.)

The Court of Appeals reversed.

—Jurisdiction Rested on Lease of Equipment to Connecting Carrier.

Capital Airlines, Inc. is not a subsidiary or parent of, or in any way related to, National. (Tr. 9a.) It does, however, have an "Equipment Interchange Leasing Agreement" with National. (Tr. 21a.)

Capital operates north and west from Washington, D. C. National operates south from Washington. (Tr. 12a.) During the winter months, from November 1 to April 30, when southern traffic increases and northern travel lessens, Capital has a surplus of equipment. (Tr. 13a.) It, therefore, leases aircraft and flight crews to National, which National operates on its flights from Washington to the

south. During the summer months, from May 1 to October 31, when the traffic flow is the other way, National in turn leases aircraft and crews to Capital, which Capital operates as its own on its lines to the north and west. (Tr. 13a, 23a.)

The interchange is made at the Washington, D. C., airport, where both lines touch. As the Court of Appeals noted (Appendix, pp. 23-24):

> "The leasing of such equipment by one to the other enables the two lines to operate continuous through flights between Cleveland and Miami or Havana, stopping at Washington. Under the Lease, a National plane, after arriving at Washington from the South, is leased, together with its National operating crew, to Capital, and then continues on to Cleveland over the Capital route. Similarly, a Capital plane after arriving in Washington from Cleveland, is leased, together with its Capital operating crew, to National, and then continues south over the National route. Through tickets are sold by each line, which show that the trip northwest of Washington was being made by Capital, and that the trip south of Washington was being made by National. Such through transportation is advertised by Capital out of its Cleveland office."

The lease specified that (Tr. 27a):

> "Flights with planes leased under the terms of this agreement shall be under the absolute operational control of the lessee during the period of the lease, and the leased flight crews shall be under the exclusive operational control of the lessee during the period of the lease."

National operated no flights into Ohio, maintained there no office, property or employees, had not qualified to do business in the state, had appointed no agent for service of process; in short, apart from the lease, National had no "contacts" of any kind with Ohio. (Tr. 9a, 12a, 15a, 21a.)

—Court of Appeals Found Jurisdiction by Refusing to Follow Green and McKibbin.

The District Court, applying the "minimum contacts" test of *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310, held National not subject to suit in Ohio. The Court said (Appendix, p. 20):

> "National is not, in my view, doing business in Ohio, and in the circumstances of this case, the requirements of due process prevent an exercise of jurisdiction by the court."

The Court of Appeals took a different view.

It reviewed the operations under the lease. It conceded (Appendix, pp. 27-28) that in *Green*, 205 U. S. 530, and *McKibbin*, 243 U. S. 264, this Court ruled "such activities by a connecting carrier within the jurisdiction did not confer jurisdiction over the foreign corporate carrier who, although receiving benefits therefrom, did not itself operate within the state."

But the Court of Appeals declined to follow those cases.

It so refused on the ground they, though unreversed by this Court, are not law.

REASONS FOR ALLOWANCE OF WRIT.

The Court should grant the writ because:

1. Judgment Below Is in Conflict With Decisions of This Court.

The repudiation by the Court of Appeals of *Green v. Chicago, Burlington and Quincy Railway Company* (1907), 205 U. S. 530, and *Philadelphia & Reading Railway Company v. McKibbin* (1917), 243 U. S. 264—when this Court has not done so—presents a question of law of obvious importance.

For one thing, although this Court has urged alertness to resist "extension * * * of jurisdiction * * * in the federal system," *Baltimore Contractors, Inc. v. Bodinger* (1955), 348 U. S. 176, 181, the decision below foretells substantial enlargement in the diversity jurisdiction of the federal courts. It authorizes suits against rail carriers and airlines, not only where they operate, but wherever their equipment and goods travel under lease over connecting lines and wherever business over their lines is solicited by a connecting carrier. It rejects the caution voiced for this Court by Mr. Justice Brandeis in *Davis v. Farmers Co-operative Equity Company* (1923), 262 U. S. 312, that (p. 317):

> "orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad * * *."

The judgment of the Court of Appeals casts doubt as well on decisions like *Bank of America v. Whitney Central National Bank* (1923), 261 U. S. 171, holding a Louisiana bank not subject to suit in New York even though it (p. 173) "had what would popularly be called a large New York business." There, it appeared (p. 173) "The transactions were varied, important and extensive. * * * Its regular New York business was transacted for it by its correspondents—the six independent New York banks."

As this Court put it (p. 173) "They, not the Whitney Central, were doing its business in New York."

The same is true here; Capital, not National, was doing business in Ohio.

The Court of Appeals in effect treated the connecting carrier as if it were National's agent, and its acts those of

National, forgetting that jurisdiction of foreign corporations, as Mr. Justice Brandeis observed (261 U. S., at p. 173):

> "does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the State or district in such a manner and to such an extent that its actual presence there is established."

—The Issue in Green and McKibbin.

In view of the reach of the judgment presented for review, it will be well to note what it was this Court ruled in the *Green* and *McKibbin* cases which the Court of Appeals now jettisons. As the Court will recall:

Green, 205 U. S. 530, concerned suit brought in the United States District Court in Pennsylvania for injuries received in Colorado by negligence of the Burlington Railroad. The Burlington did not operate east of Chicago. But it did maintain in Philadelphia an office and a district freight and passenger agent. The Court held service on the agent was not enough.

McKibbin, 243 U. S. 264, held a railroad not owning or operating any part of its lines in New York, could not be sued there for an accident occurring in New Jersey, merely because cars owned and shipped by it, loaded with goods of its shippers, regularly moved in New York over the lines of a connecting carrier, or because the connecting carrier sold, within the state, tickets good on defendant's lines and displayed defendant's name in its station and in the telephone directory. This Court held the United States District Court in New York without jurisdiction. The Court,

speaking through Mr. Justice Brandeis, said (p. 268):

> "Obviously the sale by a local carrier of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be 'doing business' in every State."

This Court has frequently cited those cases. It has never repudiated them.

—Court of Appeals Refused to Follow Those Cases.

The Court of Appeals considered *Green* and *McKibbin* no longer law on the basis of its reading of *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310, citing for that reading two of its own decisions and one from the Court of Appeals for the District of Columbia. (Appendix, p. 28.)

In addition, the Court of Appeals cited seven District Court cases (Appendix, p. 29), four from the Northern District of Ohio, one from California, one from Kentucky, and one from New York.

For these decisions thus made controlling in the Sixth Circuit, and its judgment in this case, the Court of Appeals believed it found nourishment in *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310. But, as the Court will recall, that case did not deal with a cause of action arising in a foreign state, or with activities foreign to the state. On the contrary, the Court held Washington could, consistently with due process, subject a Missouri corporation to suit in Washington to collect payments due the Washington Unemployment Compensation Fund where the employer maintained 11 to 13 full-time salesmen who (p. 313) "resided in Washington," whose

activities "were confined to that state," who "were compensated by commissions based upon the amount of their sales," who rented (p. 314) "permanent sample rooms, for exhibiting samples, in business buildings" or "rooms in hotels or business buildings temporarily for that purpose."

Other "later decisions" to which the Court of Appeals referred are:

Travelers Health Association v. Virginia (1950), 339 U. S. 643, where the Court held Virginia could issue a cease and desist order on a Nebraska company with respect to insurance sold by it by mail in Virginia.

Milliken v. Meyer (1940), 311 U. S. 457, where the Court sustained substituted service on a domiciliary of a state when he was absent therefrom.

Perkins v. Benguet Consolidated Mining Co. (1952), 342 U. S. 437, where the Court held the due process clause did not compel Ohio either to subject to, or to exempt from, suit in Ohio a foreign corporation carrying on in Ohio a continuous and systematic although limited part of its business.

In those cases the defendants resisting suit had a relationship to the state of the forum differing materially in kind and quality from the case of interchange of equipment and sale of tickets good on distant carriers.

The distinguishing factor in *International Shoe, Travelers,* and *Perkins* is that in those cases the suits arose out of the very activities within the territory of the forum which were held to constitute the necessary "contacts" with the state to support jurisdiction.

That was not the case in *Green* and *McKibbin.*

It is not the fact in the case at bar.

The Court of Appeals, it is obvious, has decided an important question of federal law which only this Court can settle.

2. District Courts Are in Disagreement as to Rule Which Should Be Applied.

Some of the district courts, acting upon implications they draw from *International Shoe Co. v. State of Washington* (1945), 326 U. S. 310, have, as the Court of Appeals noted, refused to apply *Green* and *McKibbin*.

However, as many more have taken the opposite view.

The result is unending conflict in the districts.

And, strangely, the question is one which appears rarely to reach the reviewing courts. It may be it is cheaper to settle. Or, the losing party, if defendant, thinks it may win its case anyway, or if plaintiff, prefers to look for a more hospitable forum rather than hazard all on the chances of appeal. The consequence is that the question, characterized by the district courts as "ever-vexatious" and "oft litigated but never settled," [1] "difficult," [2] and "thorny," [3] will, until this Court speaks, continue to breed contrariety of decision from district to district.

The perplexity faced by the district courts in the practical administration of justice in the law's present uncertainty is reflected in the reports. Subsequent to *International Shoe* at least sixteen districts in twelve states have adhered to the view that *Green* and *McKibbin* remain law and on that basis have held defendants not subject to suit:

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[1] 113 F. Supp. 737, 746.

[2] 72 F. Supp. 437, 440.

[3] 12 F. R. D. 508, 509.

In Pennsylvania:

Miller v. Tulsa Petroleum Co. (M. D. Pa., 1953), 117 F. Supp. 359;

Noerr Motor Freight, Inc. v. Eastern R. R. Presidents Conference (E. D. Pa., 1953), 113 F. Supp. 737;

Read v. Corbitt Co. (E. D. Pa., 1950), 10 F. R. D. 125;

Murray v. Great Northern Ry. Co. (E. D. Pa., 1946), 67 F. Supp. 944;

Solt v. Interstate Folding Box Co. (E. D. Pa., 1954), 123 F. Supp. 376.

In Minnesota:

Watterson v. New York Central System (D. C. Minn., 1953), 111 F. Supp. 448;

Myers Motors, Inc. v. Kaiser-Frazer Sales Corporation (D. C. Minn., 1948), 76 F. Supp. 291;

Webber v. Pan American Airways, Inc. (D. C. Minn., 1949), 85 F. Supp. 959;

Nordgren v. Evis-Northwest, Division of Northwest Industrial Service Corp. (D. C. Minn., 1954), 15 F. R. D. 453.

In Nebraska:

Nagl v. Northern Warren Corporation (D. C. Neb., 1948), 8 F. R. D. 130.

In Illinois:

Stetson China Co. v. D. C. Andrews & Co. of Illinois, Inc. (N. D. Ill., 1948), 9 F. R. D. 135.

In Arkansas:

McWhorter v. Anchor Serum Co. (W. D. Ark., 1947), 72 F. Supp. 437.

In Alaska:

Leakley v. Canadian Pacific Express Co. (D. C. Alaska, 1949), 82 F. Supp. 906.

In North Dakota:

Anderson v. Page & Hill Homes, Inc. (D. C. N. D., 1950), 88 F. Supp. 408.

In Montana:

Clapper Motor Co. v. Robinson Motor Co. (D. C. Mont., 1954), 119 F. Supp. 79.

In Georgia:

Zuber v. Pennsylvania R. Co. (N. D. Ga., 1949), 82 F. Supp. 670.

In Missouri:

Doyle v. Southern Pac. Co. (E. D. Mo., 1949), 87 F. Supp. 974.

In Massachusetts:

Pike v. New England Greyhound Lines, Inc. (D. C. Mass., 1950), 93 F. Supp. 669.

In New York:

Toothill v. Raymond Laboratories, Inc. (E. D. N. Y., 1951), 100 F. Supp. 350;

Smith v. Louisville & N. R. Co. (S. D. N. Y., 1950), 90 F. Supp. 189;

Goldstein v. Chicago, R. I. & P. R. Co. (W. D. N. Y., 1950), 93 F. Supp. 671;

Cole v. Stonhard Co. (N. D. N. Y., 1952), 12 F. R. D. 508.

In none of these cases was an appeal taken. The decisions, therefore, presumably state the law prevailing in those jurisdictions, indicating that, until the problem is

settled by this Court, defendants will continue to be dismissed or held, depending on views which happen to prevail in the district where suit is brought.

The decision below may settle the question for the Sixth Circuit. But it is likely only to hot the debate in other districts, many of which have said they will await word from higher authority before they yield their view that *Green* and *McKibbin* remain law and are to be followed. In the meantime energy better spent adjudicating substantive merits will continue to be dissipated by litigants the country over in trying to find out whether they have come to the right court house.

For example, in *Zuber v. Pennsylvania R. Co.* (N. D. Ga., 1949), 82 F. Supp. 670, the court said (p. 675):

> "Sufficient it is to say in this Court that an examination of the authorities reveals that the *Green* case, *supra,* is still declaratory of the law. This Court is not only a believer in the validity and necessity of precedent and the rule of *stare decisis* within proper limits, but whether or not a believer, it is certainly bound. If changes in the application of the laws should be made, and well they might be in some aspects of this question, such change is a matter for more authoritative courts."

And in *Noerr Motor Freight, Inc. v. Eastern R. R. Presidents Conference* (E. D. Pa., 1953), 113 F. Supp. 737, observing that (p. 748) "this district has rather consistently followed the *Green* case," the court held (p. 748):

> "because of decisions in this district indicating a strict adherence to the ruling in the *Green* case, despite the views expressed in *International Shoe Co. v. State of Washington,* 326 U. S. 310, 60 S. Ct. 154, 90 L. Ed. 95, as it relates to the concept of 'doing business,' I feel constrained in this case to find that the named defendants are not 'doing business' and may not be

'found' within this district and are therefore not subject to service of process here."

The machinery of the law ought to be so sure and certain that litigant and counsel may know what court is open to them.

This is not so now.

CONCLUSION.

This case brings for review an important, and persistently arising, question of federal jurisdiction on which the district courts are at odds. That conflict the Courts of Appeals cannot resolve because (a) the controversy, as history shows, usually ends with the district court's decision and (b) they cannot in any event authoritatively say which of this Court's decisions need no longer be followed.

The resulting diversity of decision from district to district, already of such proportions that district courts in one-fourth of the states follow a rule at variance with that announced by the court below, is apt to continue to mount until this Court settles the question.

The writ should issue.

Respectfully submitted,

THOMAS V. KOYKKA,
EDWARD D. CROCKER,
Counsel for Petitioner.

April 26, 1955,
Cleveland, Ohio.

OPINION OF DISTRICT COURT.

Civil No. 29,499.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

THELMA SCHOLNIK,
Plaintiff,

vs.

NATIONAL AIRLINES, INC.,
Defendant.

MEMORANDUM.

JONES, *J.*:

National Airlines, Inc., appearing specially for the purpose of these motions, moves to quash service of summons and to dismiss the complaint.

Service upon "National" was attempted by serving C. J. Miller, Jr., District Sales Manager of Capital Airlines, as agent of "National"; and additionally, by serving Robert Denton, a pilot of National, who was found within the District.

National asserts that such service is insufficient, and further asserts that it is not "doing business" within the State of Ohio so as to subject it to the jurisdiction of the court. Thus, it poses the troublesome problem of corporate presence for purposes of suit.

The accident from which the present action arises happened while plaintiff was a passenger aboard one of National's flights between Havana, Cuba, and Miami, Florida.

National is a Florida corporation. Its airline has a northerly terminus at Washington, D. C. However, under a so-called "Equipment Interchange Agreement" with Capital Airlines it does operate flights into Cleveland, Ohio, during certain months of the year.

The equipment interchange agreement is approved by the Civil Aeronautics Board. It provides for the mutual "leasing" of planes and crews by the respective carriers. During the winter months Capital conducts regular flights from Cleveland to Washington, D. C. At Washington, the planes and crews are "leased" to National and continue southward. This arrangement continues upon the return flight to Washington. The situation is reversed during the spring and summer months. Planes and crews of National are "leased" to Capital at Washington, D. C. for the northern leg of their flight to Cleveland and beyond and their return to Washington.

The agreement has further detailed provisions for the allocation of expenses and the division of revenue. The "lessor" in each instance is made responsible for loss or damage to its aircraft and equipment when operating on the combined flights, and control of flight operations appears to rest with the "lessor."

The agreement also provides for a joint program of advertising and publicity of the various through flights.

The agreement is somewhat ambiguous as to liability for injury to passengers and damage to property caused by operation of the aircraft. Apparently, either party may be responsible.

Plaintiff asserts that National does business in Ohio; placing emphasis on the fact that airplanes owned by National and operated by its crews come into Cleveland Hopkins Airport for purposes of airline operation. She further contends that the interchange agreement creates a "continuing, on-going relationship" which constitutes doing business in Ohio throughout the year. She points out that through flights from Cleveland to Maimi are announced at the Cleveland airport as "Capital-National" flights, even in the winter season, and tickets are sold in Cleveland by Capital for these flights.

National relies upon the fact that it operates no flights of its own north of Washington, D. C.; specifically, that it operates no flights within the State of Ohio, maintains no offices within the State, and has not appointed an agent for service of process within the State. It argues that the agreement creates only the relationship of connecting air carriers.

Amenability to suit in this instance must depend upon whether National has the "minimum contacts" with the territory of the forum, sufficient to satisfy the demands of due process. *Int. Shoe Co. v. Washington*, 326 U. S. 310 (1945). "Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." *Int. Shoe Co. v. Washington, supra*, page 317.

It seems to me that it would be imposing an unreasonable burden upon defendant to require it to defend the present suit in this forum. The claim arises out of its gen-

eral business activities. Its only contact with the State of Ohio is its limited activities, in what fairly may be considered to be a joint-enterprise with Capital. It maintains no office here, and its employees are only temporarily within the State when engaged in their duties connected with the joint undertaking. Cf. *Perkins v. Benguet Consolidated Mining Co., et al.*, 342 U. S. 437 (1952).

Any "estimate of the inconveniences" and burdens involved must take into account whether the claim arose from activities within the territory of the forum. *Beach v. Kerr Turbine Co.*, D. C. N. D. Ohio, 243 Fed. 706 (1917).

National is not, in my view, doing business in Ohio, and in the circumstances of this case, the requirements of due process prevent an exercise of jurisdiction by the court.

The court also must conclude that defendant is not amenable to suit because service of summons in this case is not sufficient.

While Capital undoubtedly may be held to be an agent of National for purposes of the joint-enterprise, no justification appears for transforming a limited agency into a general one embracing all business conducted by National. Capital is not, as it seems to me, a "managing or general" agent for any substantial part of the business of National. Rule 4(d)(3), Rules of Civil Procedure; Cf. *Clover Leaf Freight Lines, Inc. v. Pacific Coast Wholesalers Ass'n.*, 7 Cir. 166 F. 2d 626 (1948).

The same is true with respect to Robert Denton, a pilot of National, who also was served. An employee temporarily within the State is not a managing agent.

Summons also may be served upon a corporation in accordance with the law of the state in which the service is made. Rule 4(d)(7). With respect to foreign corporations, Section 11290 of the Ohio General Code provides for

service upon a managing agent in the State, or where the cause of action has accrued within the State, upon any officer or employee of the corporation. However, the attempted service in this instance fails to meet the requirements of the State statute. Cf. *Bach v. Friden Calculating Machine Co.*, 6 Cir., 167 F. 2d 679 (1948); *Perkins v. First National Bank of Cincinnati, et al.*, 37 O. O. 162 (1948); *Simonson v. Gulf Refining Co.*, 23 O. O. 486 (1942); *Sprung, Admrx. v. E. I. duPont de Nemours & Co.*, 16 O. O. 352 (1939).

The claim did not arise in the State; and, as stated heretofore, National does not have a managing agent in Ohio.

The action will be dismissed, and an order entered accordingly.

Motions granted.

JONES,

United States District Judge.

November 12, 1953.

OPINION OF COURT OF APPEALS.

No. 12,170.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

THELMA SCHOLNIK,
Appellant,

v.

NATIONAL AIRLINES, INC.,
Appellee.

APPEAL FROM THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided February 4, 1955.

Before ALLEN, McALLISTER and MILLER, Circuit Judges.

MILLER, Circuit Judge. The appellant, Thelma Scholnik, a citizen of Ohio, filed this action in the District Court for the Northern District of Ohio against National Airlines, Inc., a Florida corporation, to recover damages in the amount of $40,000 for personal injuries sustained on or about June 11, 1951 while a passenger in a National Airlines plane while the plane was over Florida in flight from Havana, Cuba, to Miami, Florida. The complaint alleged that the injuries resulted from being thrown out of her seat into the aisle by reason of the negligent operation of the plane. The District Judge sustained appellee's motion to quash service of summons and to dismiss the complaint, holding that the appellee was not doing business in Ohio,

that the summons was not served on an authorized agent of the appellee, and that the District Court in Ohio had no jurisdiction over it. This appeal followed.

The facts are not in dispute and are shown by affidavits, a deposition and documentary evidence to be as follows: National Airlines, Inc., hereinafter referred to as National, is engaged in the business of transporting passengers by airplane. It has certificates from the Civil Aeronautics Board for operation over routes from New York to Miami, Florida, from Jacksonville and Tampa, Florida to New Orleans, Louisiana and from Tampa to Havana, Cuba. It operates no flights into the State of Ohio and maintains no office in Ohio. Some of its planes operating from the south into Washington, D. C. are thereafter flown from Washington into Cleveland, Ohio, under an Equipment Interchange Leasing Agreement, hereinafter referred to as the Lease, entered into between National and Capital Airlines, Inc., hereinafter called Capital. Capital is a Delaware corporation, separate and distinct from National, is neither a parent nor a subsidiary corporation to National, and, unless made so by the Lease, is not the servant or employee of National.

The Lease has this factual base. National does not operate any flight to the northwest of Washington. Capital operates a flight from the northwest (Cleveland, Ohio) into Washington but not to the south thereof. During the summer six months, May through October, Capital's business increases and it becomes short of equipment. National has equipment which it can furnish to Capital during this period. In the winter months, November through April, when Capital's business falls off, it has excess equipment which it can furnish to National. The leasing of such equipment by one to the other enables the two lines to operate continuous through flights between Cleveland and

Miami or Havana, stopping at Washington. Under the Lease, a National plane, after arriving at Washington from the South, is leased, together with its National operating crew, to Capital, and then continues on to Cleveland over the Capital route. Similarly, a Capital plane after arriving in Washington from Cleveland, is leased, together with its Capital operating crew, to National, and then continues south over the National route. Through tickets are sold by each line, which show that the trip northwest of Washington was being made by Capital, and that the trip south of Washington was being made by National. Such through transportation is advertised by Capital out of its Cleveland office.

The Lease, entered into on June 2, 1950, was subject to, and became effective only on, approval by the Civil Aeronautics Board, and was so approved. It provided that from November 1st to April 30th of each year Capital would lease certain aircraft and flight crews to National, and from May 1st to October 31st of each year National would lease certain aircraft and flight crews to Capital, the leases being for the purpose of providing through service on such of the schedules of the parties thereto connecting at Washington as the parties shall determine by mutual agreement. The lease of the aircraft and flight crews became effective upon delivery of the aircraft in question by the owner to the lessee, and the lease terminated upon the delivery of the aircraft by the lessee to the owner. Such delivery was ordinarily to be made immediately after the aircraft arrived at the ramp at the airport then serving the city of Washington. A written receipt describing the aircraft and the time of such delivery was executed by the receiving carrier.

The Lease provided: "Each party shall have the exclusive right, subject to the orders of the Civil Aeronautics

Board, to fix the scheduled stops to be made on its routes, and nothing contained in this agreement shall be construed to grant either party any right whatever (a) to determine whether any flight of the other party shall be operated or cancelled in whole or in part or (b) to exercise any control over any operation or business or affairs of or interest in the other party, except as may be specifically provided for herein or as may be an incident of this agreement.

Flights with planes leased under the terms of this agreement shall be under the absolute operational control of the lessee during the period of the lease, and the leased flight crews shall be under the exclusive operational control of the lessee during the period of the lease. * * *

The lessor of aircraft and equipment hereunder shall make such change in the radio equipment in its aircraft as to conform to the assigned frequencies of the lessee."

The Lease also contained the following provisions: The lessor was responsible for loss of or damage to its aircraft and equipment while leased to the other, except that the lessee would be liable to the lessor for such loss or damage as (1) occurred when the aircraft was on the ground and not taxiing in or out with respect to a flight, and (2) occurred as a result of negligence on the part of the lessee or its employees. Each party would at all times maintain appropriate insurance covering its responsibilities for loss of or damage to aircraft while under lease. The lessee was to keep in full force and effect at its expense insurance insuring both itself and the other party, as their respective interests might appear, against liability for injuries to or deaths of passengers and third parties, and damage to property caused by the operation or possession of such aircraft. The lessee agreed to indemnify the other party during the period in which it had possession of the

aircraft against all damage or claims caused by the operation or possession of such aircraft.

The Lease contained lengthy and detailed provisions with respect to the rental for leased aircraft and flight crews. In general, certain types of expense, measured in cents per revenue mile, were allocated to each airline, (1) when operating as lessee and (2) when operating as lessor. The lessee was to keep an accurate record of the revenues generated by the leased aircraft on the mileage operated under lease. The lessor and lessee would each receive such proportion of such revenues as their respective expenses per plane mile bore to the total expenses per plane mile, which division would be continued until the lessor and lessee each recovered their expenses. In the event the flights with leased equipments resulted in revenues above the expenses of both lessor and lessee, the excess of such revenues was to be divided 45% to the lessor and 55% to the lessee.

Historically, the jurisdiction of a court to render a judgment in personam against a defendant depended upon the presence of the defendant within the territorial jurisdiction of the court. *Pennoyer v. Neff*, 95 U. S. 714. The strictness of that rule has given way somewhat to the present view that due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U. S. 310, 316; *Milliken v. Meyer*, 311 U. S. 457, 463.

With respect to a corporation, its presence without the state of its origin is manifested only by activities carried on in its behalf by those who are authorized to act

for it. As said in *International Shoe Co. v. Washington, supra,*—"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. (Cases cited.) Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to serve. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations." See also, *Perkins v. Benguet Mining Co.,* 342 U. S. 437.

In support of her contention that National has the necessary minimum contacts with the state of Ohio to confer jurisdiction over it in Ohio, appellant relies on the actual operation of National's planes by National crews in Ohio and on the activities of Capital in Ohio in advertising the Capital-National through flight to Miami, the sale of through tickets by it in Cleveland together with other services incidental thereto, and the benefits resulting to National through such activities on its behalf in Ohio. Appellee contends that by reason of the Lease, which is a validly executed contract between two separate, independent corporations and must be recognized, it is not operating any planes in Ohio, and that the activities of Capital on its behalf in Ohio are no more than those considered by the Supreme Court in analogous cases involving connecting railroad carriers. In such cases, the Supreme Court ruled that such activities

by a connecting carrier within the jurisdiction did not confer jurisdiction over the foreign corporate carrier who, although receiving benefits therefrom, did not itself operate within the state. *Green v. Chicago, Burlington and Quincy Ry. Co.*, 205 U. S. 530; *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264.

Appellant contends that the net over-all effect of the numerous provisions of the Lease is not to create the relation of lessor and lessee, but rather the relation of participants in a joint enterprise, which eliminates the claimed insulating effect of the alleged lease.

We are of the opinion that the rule applied in the *Green* and *McKibbin* cases has been materially changed by later decisions of the Supreme Court. In *Lasky v. Norfolk & W. Ry. Co.*, 157 F. (2d) 674, C. A. 6th, we considered a situation similar to those in the *Green* and *McKibbin* cases in the light of the Supreme Court's opinion in *International Shoe Co. v. Washington, supra.* On the authority of that case we held that the defendant carrier, although a foreign corporation with no part of its lines located in the Northern District of Ohio, and although it made no contracts, issued no bills of lading and sold no tickets in the Northern District, was nevertheless doing business in the district and subject to service of process therein, by reason of the extensive and continuous solicitation of business by it in the district. In our opinion, such activity on its behalf within the district supplied the minimum contacts on the part of the corporation with the state of the forum as to make it reasonable to require the corporation to defend a particular suit brought in that district. See also: *Bach v. Friden Calculating Machine Co.*, 167 F. (2d) 679, C. A. 6th; *Frene v Louisville Cement Co.*, 134 F. (2d) 511, C. A. D. C.

The effect of *International Shoe Co. v. Washington, supra,* has been referred to by numerous district court cases, the following of which represent the strongly prevailing view that the earlier rulings of the Supreme Court in the *Green* and *McKibbin* cases are no longer a correct statement of the law. *Willett v. Union Pac. R. Co.,* 76 Fed. Supp. 903, N. D. Ohio; *Perkins v. L. & N. R. R. Co.,* 94 Fed. Supp. 946, S. D. Cal.; *Bonesteel v. Steelco Stainless Steel,* 97 Fed. Supp. 985 N. D. Ohio; *Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co.,* 102 Fed. Supp. 258, E. D. Ky.; *Cooke v. Kilgore Mfg. Co.,* 105 Fed. Supp. 733, N. D. Ohio; *Healing v. Isbrandtsen Co.,* 109 Fed. Supp. 605, S. D. N. Y.; *Krnach v. Electro Lift,* 13 F. R. D. 131, N. D. Ohio.

In *Travelers Health Ass'n. v. Virginia,* 339 U. S. 643, the Supreme Court applied its new concept of "doing business" by a foreign corporation to a corporation which had no office or paid soliciting agent in Virginia but issued a substantial number of health insurance policies to residents in that state through use of the mail. It held that metaphysical concepts of "implied consent" and "presence" in a state were not controlling, and "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state."

For the purposes of the present ruling, it is unnecessary to determine the exact legal effect of the provisions of the Lease. A valid lease by National of its planes and crews to Capital is only a part of the picture. Under the decisions above referred to it is not necessary that National operate its planes in Ohio in order to be treated as being present in Ohio. In many of the activities per-

formed by Capital in its Cleveland office with respect to the through flights, it is acting for National and with authority from National to so act. In addition to solicitation of business it makes the actual contracts of carriage over National's lines with residents of Ohio and collects payment therefor. In such activities, agency clearly exists. Even though the actual cost of such service may not be charged directly or indirectly to National in the mutual accounting provided by the Lease, compensation for such agency services would be found in the performance of similar services for Capital by National in National's southern offices. Such activities on behalf of National, coupled with operations under the Lease, with resulting benefits to National, carried on continuously over a period of years as a regular part of National's business, in our opinion furnish the necessary minimum contacts with the Ohio forum so that the maintenance of a suit against it in that forum does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington, supra; Travelers Health Ass'n. v. Virginia, supra; Lasky v. Norfolk & W. Ry. Co., supra.*

Summons was served on National by delivery to the District Sales Manager of Capital in Cleveland. A second summons was served on Robert Denton who was a pilot of a National plane under lease to Capital at the Cleveland airport.

Rule 4(d)(3), Rules of Civil Procedure, provides for service upon a foreign corporation by delivery of the summons and complaint to "a managing or general agent." Rule 4(d)(7) also authorizes service upon a foreign corporation "in the manner prescribed by the law of the state in which the service is made." Sec. 11290 of the Ohio General Code, in effect at the time, provides: "When the defendant is a foreign corporation, having

a managing agent in this state, the service may be upon such agent." It is not required under either the Federal or State provision that the agent served be the general agent or general manager of defendant's business in the state. It is sufficient if he is "a managing" agent. Based upon our ruling that National was doing business in Ohio by reason of its relations with Capital, delivery of process to the District Sales Manager of Capital was a valid service. *Bach v. Friden Calculating Machine Co., supra*; *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 F. 919, C. A. 6th; *Beach v. Kerr Turbine Co.*, 243 F. 706, 709, N. D. Ohio; *Bomze v. Nardis Sportswear*, 165 F. (2d) 33, 37, C. A. (2d).

The ruling of the District Judge was influenced in part by a consideration of the unreasonable burden upon appellee in requiring it to defend the suit in the Ohio forum. Our ruling does not necessarily have that result. Whether the case should be transferred to a more convenient forum under the provisions of Sec. 1404(a), Title 28, U. S. Code is not involved in this ruling and is still a matter for the consideration of the District Court.

The judgment is reversed and the case remanded to the District Court for further proceedings consistent with the views expressed herein.

JUDGMENT OF COURT OF APPEALS.

(Filed February 4, 1955.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for further proceedings consistent with the opinion filed herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 758.

NATIONAL AIRLINES, INC.,
Petitioner,

v.

THELMA SCHOLNIK,
Respondent.

PETITIONER'S REPLY BRIEF
In Support of Petition for Writ of Certiorari.

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June 1, 1955.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 758.

NATIONAL AIRLINES, INC.,
Petitioner,
v.
THELMA SCHOLNIK,
Respondent.

PETITIONER'S REPLY BRIEF
In Support of Petition for Writ of Certiorari.

The judgment below rests on the premise *Green*, 205 U. S. 530, and *McKibbin*, 243 U. S. 264, "are no longer a correct statement of law." (Appendix to petition, p. 29.)

Respondent, however, resists review on the theory that "such a holding was unnecessary to the decision of this case because the facts are such that even under *Green* and *McKibbin*, National is present and suable in Ohio." (Respondent's brief, p. 12.)

The factual argument respondent here renews was urged to the court below. But the Court of Appeals held:

> "It [petitioner, National Airlines] operates no flights into the State of Ohio and maintains no office in Ohio." (App., p. 23.)

The court recognized that the facts here brought the case within *Green* and *McKibbin*. The court noted:

> "In such cases, the Supreme Court ruled that such activities by a connecting carrier within the jurisdiction did not confer jurisdiction over the foreign corporate carrier who, although receiving benefits therefrom did not itself operate within the state." (App., pp. 27-28.)

But the court declined to follow those decisions because—

> "We are of the opinion that the rule applied in the *Green* and *McKibbin* cases has been materially changed by later decisions of the Supreme Court." (App., p. 28.)

Thus the critical point on which this case turns—a point on which the district courts the country over are at odds—is whether

> "the earlier rulings of the Supreme Court in the *Green* and *McKibbin* cases are no longer a correct statement of the law." (App., p. 29.)

On the assumption these cases are not to be followed, the Court of Appeals reversed.

There will, to be sure, as respondent suggests, always be borderline cases.

But when the rule of law is left in doubt, confusion is complete. Accordingly, until this Court speaks, district courts will continue to decide cases, some applying one rule, some another.

The debate as to the applicable rule only this Court can quiet.

Until it does, the confusion now existing—where district courts in one-fourth of the states adhere to a rule at odds with that declared below—is bound to mount.

The Court should grant the writ.

Respectfully submitted,

THOMAS V. KOYKKA,
EDWARD D. CROCKER,
Attorneys for Petitioner.

June 1, 1955.
Cleveland, Ohio.

Office - Supreme Court
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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 758.

NATIONAL AIRLINES, INC.,
Petitioner,

v.

THELMA SCHOLNIK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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May 20, 1955.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-3647

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 758.

NATIONAL AIRLINES, INC.,
Petitioner,

v.

THELMA SCHOLNIK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

I. Petitioner says this case brings for review the question whether the Court of Appeals erred in holding that the *Green*[1] and *McKibbin*[2] cases are no longer law. Respondent believes that before this can be reached there is a preliminary question whether the facts of the case actually raise the issue of the present validity of the *Green* and *McKibbin* cases.

Respondent believes they do not.

II. If the petition for certiorari is granted the Court will have before it the following questions:

---

[1] *Green v. Chicago, Burlington and Quincy Ry. Co.*, 205 U. S. 530, 1907, which held a foreign corporation not present and suable where it conducted mere solicitation.

[2] *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 1917. Defendant was not made present in New York by the fact that a connecting railroad hauled its cars there and sold coupon tickets for passage over its lines.

(A) *Is National Airlines, Inc.* sufficiently *present in Ohio* to enable the United States District Court to take jurisdiction over its person in a tort suit that arose in Florida and is brought by a citizen of Ohio, when twice a day for six months of each year National's planes and crews make commercial flights into Ohio, both plane and crew being "leased" to Capital Airlines, Inc., for each such flight, pursuant to an interchange agreement approved by the Civil Aeronautics Board, and which, among other things, provides for Capital to sell tickets for National, and for a sharing of the revenues of the flights, and imposes upon National Airlines, Inc. sole responsibility for damage to the planes resulting from negligence of its employees?

The District Court answered this question NO. The Circuit Court answered it YES. Plaintiff-respondent believes it should be answered YES.

(B) Assuming Question (A) is answered YES *is Capital Airlines, Inc., an appropriate agent* to receive service of summons upon National Airlines, Inc., when, pursuant to the same interchange agreement, Capital provides all necessary ground services in Ohio for the said commercial flights of National's airplanes, conducts joint advertising with National of the passenger service provided by the interchange flights, solicits business and sells tickets for National in connection with the interchange flights, and maintains offices in Ohio that are listed as offices of National in National's advertising?

The District Court answered this question NO. The Circuit Court answered it YES. Plaintiff-Respondent believes it should be answered YES.

(C) Assuming Question (A) is answered YES and Question (B) is answered NO, *was Robert Denton an appropriate agent* to receive service of process on National Airlines, Inc., when on June 9, 1953, he landed at Cleveland-Hopkins Airport as pilot of a National plane flying in Ohio pursuant to the interchange agreement?

The District Court answered this question NO. The Circuit Court did not find it necessary to answer it. Plaintiff-respondent believes it should be answered YES, if it is reached.

Petitioner says this case presents a question under Rule 52 of the Federal Rules of Civil Procedure relating to the scope of review by the Circuit Court. The question is whether the District Court's finding that National Airlines, Inc., was not subject to its jurisdiction is reversible in the absence of clear error. Respondent believes no such question is presented here for the following reasons:

(a) It was not presented to the Court of Appeals.[3]

(b) Rule 52 relates to findings of fact after a trial. No trial was had in this case. The evidence was presented to the Circuit Court in exactly the same manner as to the District Court.

(c) The finding referred to by the petitioner's question was a conclusion of law, or at best a mixed conclusion of law and fact, not a finding of fact within Rule 52.

(d) The District Court's ruling was clearly erroneous.

---

[3] As evidence on this point Respondent has had the briefs in the Court of Appeals certified as part of the record here.

STATUTES APPLICABLE.

—Service of Process.

Federal Rules of Civil Procedure, Rule 4 (d) provides as follows:

> "Service shall be made as follows:
>
> * * * * *
>
> "(3) Upon a * * * corporation * * * by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. * * *
>
> "(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served * * * in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Ohio General Code, Section 11290[4] provided:

> "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

—Transfer in the Interest of Justice.

28 U. S. C. A., Section 1404 (a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

---

[4] We cite the Ohio General Code rather than the Revised Code because service in this case was accomplished before the Revised Code became effective.

—Venue.

Petitioner quotes as an applicable statute 28 U. S. C. A., Section 1391(c). Respondent believes this has no application to the case because it is a venue statute rather than one dealing with jurisdiction over the person of the defendant petitioner. Venue is supplied under 28 U. S. C. A., Section 1391 (a) by the residence of the plaintiff-respondent in the Northern District of Ohio, Eastern Division, and is not in issue.

STATEMENT OF CASE.

A. Litigation to Date.

—The Suit.

Plaintiff-respondent was injured on June 11, 1951, when as a passenger in a National Airlines plane in Florida, in flight from Havana to Miami, she was thrown out of her seat and injured (R. 5a, 6a).

A citizen of the Northern District of Ohio, she filed suit in the Federal Court in Cleveland on September 15, 1952, alleging that her injuries resulted from negligence of National Airlines, Inc., a citizen and resident of Florida (R. 5a, 11a).

—Summons.

Summons of National Airlines, Inc. was served on September 15, 1952, by handing it to the district sales manager of Capital Airlines, Inc. in Cleveland (R. 7a).

The defendant moved to quash the service and to dismiss the action on the ground that it was not doing business in Ohio and had not appointed an agent for receipt of service of process in Ohio (R. 8a).

A second summons was served on June 9, 1953, upon Robert Denton, pilot of a National Airlines plane that

landed at Cleveland Hopkins Airport under lease to Capital (R. 20a, 46a).

Defendant moved to quash this second summons too, on similar grounds.

—Quashed and Dismissed by District Court.

The District Court granted both motions to quash and dismissed the suit, apparently on the ground that while the defendant was engaged in a joint enterprise with Capital (R. 49a, 50a, Pet. 20), and while it did conduct "limited activities" (R. 49a, Pet. 20) in Ohio:

> "It would be imposing an unreasonable burden upon defendant to require it to defend the present suit in this forum." (R. 41a, Pet. 19.)

—Reversed by Court of Appeals.

The Court of Appeals reversed on the ground that National was doing business in Ohio (Pet. 31) and had the necessary minimum contacts with the Ohio forum so that suit against it there would not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U. S. 310, 316 (Pet. 30). The Circuit Court left it to be determined by the District Court under 28 U. S. C. A., Section 1404(a), whether it would be an unreasonable burden for defendant to be required to defend the suit in Ohio (Pet. 31).

B. National's Contacts and Presence.

There are many facts establishing that National is doing business in and has the necessary "minimum contacts" with Ohio.

—Equipment Interchange.

To make better use of their planes and in effect to lengthen the route over which each may provide service, National Airlines, Inc. and Capital Airlines, Inc. have entered into an equipment interchange agreement (R. 21a to 41a). This provides for some of National's planes to be leased to Capital at Washington en route from Miami to Detroit, and to be returned to National at Washington on the return flight. This occurs daily from May to October each year. Reciprocally, Capital's planes are leased to National for flights from Washington to Miami and back from November to April (R. 23a).

—National Does Business in Ohio.

Petitioner asserts that because of this "leasing" of the planes and crews to Capital for the flight into Ohio, National Airlines is not operating planes or doing business in Ohio.

It may be that to the extent other provisions of law require one or the other to be "*the* operator," Capital is *it* rather than National; but whether National is doing business in Ohio or has sufficient "contacts, ties or relations" with Ohio does not depend upon such technicalities. The contract itself acknowledges that at least in some sense the lessor is "operating": it refers to each party not only "when operating as lessee" but also "when operating as lessor" (R. 28a, 30a).

If, in any sense, Capital is the sole "operator" of National's planes in Ohio, then National must be its agent for paying the crews, providing gasoline, oil and insurance, providing maintenance of the flight equipment, and providing a portion of the passenger service expense, for these

expenses are listed (R. 30a) as lessor's expenses for which National is to be reimbursed by Capital (R. 31a to 33a).

But the reimbursement is not a sure thing. The lessor is to be reimbursed only to the extent that the revenues are sufficient to pay the expenses of both parties (R. 28a to 30a). On the other hand, if the revenue is more than sufficient the lessor receives 45% of the surplus (R. 32a).

Thus the lessor takes a risk in hope of a profit.

Surely this is doing business.

—Capital is National's Agent in the Joint Enterprise.

To make it possible for National to profit as lessor the contract provides that Capital, as lessee, will provide and bear the expense of ground operations, ground equipment maintenance and depreciation, indirect equipment maintenance, passenger service, traffic and sales and general and administrative expenses (R. 28a to 30a).

Since the contract creates a duty on the part of Capital to provide these services and pay these expenses so that National may hope to profit from the flights into Ohio, there is a sense in which Capital is the agent of National. The Court of Appeals so found as to the solicitation and sales (Pet. 30). The intermingling of interests and the mutuality of agency led the District Court to conclude that there was a joint enterprise between National and Capital (Pet. 20, R. 49a, 50a).

—National Risks Loss of Equipment.

There are other significant aspects of the operation. The contract explicitly provides that

> "the lessor (and not the lessee) shall be responsible for loss of or damage to lessor's aircraft and equipment while leased hereunder" (R. 37a).

The meaning of this clause is illuminated by the exception that follows:

> "except that the lessee shall be liable to the lessor for loss of or damage to lessor's aircraft or equipment, provided such loss or damage (1) occurs when the aircraft and equipment are on the ground and are not taxiing in or out with respect to a flight, and (2) occurs as a result of negligence on the part of the lessee or its employees." (R. 37a.)

In other words, although Capital has "absolute" or "exclusive" operational control (R. 27a), it is never responsible for any loss of equipment that results from the negligence of National's employees. It is responsible only for negligence of its own employees, and even then only if the plane is at rest on the ground after taxiing in and before taxiing out. Even for negligence in the exercise of Capital's "absolute" or "exclusive" "operational control" while the plane is in flight Capital is not responsible. This is completely explicit:

> "* * * it being the intention of the parties that the lessor assumes all responsibility for loss of or damage to aircraft and equipment when such aircraft and equipment are on 'ramp to ramp' time in connection with a flight." (R. 37a.)

Here again National assumes a risk in exchange for a hoped for profit.

—Year-round Business in Ohio. Advertising, Sales and Office.

Another aspect of the joint enterprise is that through it National's business in Ohio extends the year round. This is so not only because the interchange agreement creates a continuing, on-going relationship between National and Capital that runs year after year and takes

National's planes there every summer. It is true for the additional reason that some of National's activities in Ohio continue even during the six months when its planes do not fly there. The through flights from Cleveland to Miami are announced at Cleveland Hopkins Airport as "Capital-National" flights, even in the winter season (R. 42a). Even in the winter season tickets are sold in Cleveland for the through flight, and National receives part of the revenue of the flight even though, under the interchange agreement, the entire trip is made with Capital planes. National's advertising literature is carried into Cleveland by Capital planes (R. 16a, 42a). This advertising matter includes National's schedules, which include Pittsburgh, Detroit, and Cleveland (R. 17a and Exhibit 1,[5] attached to Foreman's original deposition). The National Airlines Schedule (Exhibit 1, attached to Foreman's deposition) contains a page headed with the caption "Reservations—Ticket Offices." Under this caption, opposite the name "Cleveland, Ohio," appear the words "Cleveland-Statler Hotels, Phone Orchard 1-1621." The fact that these are the offices of Capital Airlines, Inc. does not alter the fact that National holds out to the public that they are its offices too.

—Conclusion of Fact.

The massive, unavoidable *fact* that controls the decision of this case is that National Airlines, Inc., the petitioner, is doing business in Ohio.

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[5] The original Exhibit is certified here as part of the record.

SUMMARY OF ARGUMENT.

National claims that its planes and crews are in Ohio under lease to Capital Airlines, Inc., so that National does not operate them. It also claims that Capital's activities in Ohio on National's behalf are no more than those considered by the Supreme Court in what it says are analogous cases involving connecting railroad carriers, *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264 (1917); and solicitation by a railroad, *Green v. Chicago, Burlington and Quincy Ry. Co.*, 205 U. S. 530 (1907).

To these claims of National Airlines the Circuit Court made two replies: first, that the rulings of *Green* and *McKibben* are no longer a correct statement of the law, having been changed by later decisions of the Supreme Court (Pet. 28, 29); and second, that under those decisions National is present in Ohio, even without operating the planes (Pet. 29), by reason of the fact that Capital not only solicits business for National in Ohio but also makes contracts of carriage over National's lines and collects payment therefor, and the fact that coupled with these activities are the operations under the lease, carried on continuously over a period of years as a regular part of National's business (Pet. 30).

Petitioner National Airlines asks review of the Circuit Court's ruling. It complains that the Circuit Court erred in holding that the *Green* and *McKibbin* cases are no longer law, and in holding that petitioner is doing business in Ohio and is subject to the jurisdiction of an Ohio federal court. Petitioner urges that the law on *Green* and *McKibbin* is in such a state of confusion that this Court should seize this opportunity to clarify it.

The *Green* case held that mere solicitation of business by a foreign corporation does not manifest a sufficient

corporate presence to support a court's jurisdiction over its person. The *McKibbin* case held a railroad was not made present in New York by the fact that a connecting carrier hauled its freight cars there and sold coupon passenger tickets good over its lines.

Respondent believes the Circuit Court was right in looking to "minimum contacts" that would satisfy "traditional notions of fair play and substantial justice," rather than to the metaphysical concept of "presence," and that in this sense the *Green* and *McKibbin* cases are no longer law.

But respondent believes that such a holding was unnecessary to the decision of this case because the facts are such that even under *Green* and *McKibbin* National is present and suable in Ohio.

Thus if there is disagreement among lower courts as to the present validity of *Green* and *McKibbin* so that the law cries for clarification, still this case is not an appropriate vehicle for such enlightenment. Whatever could be said in this case about *Green* and *McKibbin* would be dictum, not binding law.

The writ of certiorari should be denied.

ARGUMENT.

—Green and McKibbin Cases Below.

Petitioner urges that the writ of certiorari should be issued because, it says in effect, the Circuit Court went off the deep end, exceeded its authority, in saying:

> "The rule applied in the *Green* and *McKibbin* cases has been materially changed by later decisions of the Supreme Court." (Pet. 28.)

and in referring to:

> "the strongly prevailing view that the earlier rulings of the Supreme Court in the *Green* and *McKibbin* cases are no longer a correct statement of the law." (Pet. 29.)

Clearly the Circuit Court was right in these statements. It is clearly true that the test of jurisdiction is no longer the metaphysical concept of "presence," but rather whether the defendant has such minimum contacts with the territory of the forum that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U. S. 310, 316.

But further defense of these statements we leave to the opinion of the Court of Appeals itself.

For the Court of Appeals did not say that the *Green* and *McKibbin* cases were overruled in the sense that cases having the same facts would produce different results today. There was no occasion for it to go to this length, for the facts in the present case are very different from those of the *Green* and *McKibbin* cases and would surely support jurisdiction under the *Green* and *McKibbin* cases themselves.

Petitioner quotes (Pet. 1) the opinion below in such manner as to create an impression that the Court of Ap-

peals said that the *Green* and *McKibbin* cases were analogous to the present one. This is not true. The Court of Appeals said only that petitioner (appellee below) *contended* they were analogous. (Pet. 27.)

—The Green Case.

Green v. Chicago, Burlington & Quincy Ry. Co., 205 U. S. 530 (1907), is the classic case holding that "mere solicitation" by the defendant does not support a court's jurisdiction over it. If there were nothing more, the fact that Capital Airlines not only solicits business for National but also sells tickets for it would distinguish our present case from the *Green* case. But there is far more.

If the use of Capital's certificated route by National Airlines can be likened to use by one railroad of another's tracks, the *Green* case could be likened to our present case only if the Chicago, Burlington & Quincy Ry. Co. had regularly sent its trains, including its locomotives and crewmen, to Philadelphia on the tracks of, for example, the Pennsylvania Railroad, receiving a part of the fare or freight for the service thus provided, and if by contract the Pennsylvania had provided the Burlington with roundhouse repair service, fuel, water, and other terminal services. The distinctions between the *Green* case and the one now before the Court are plain.

—The McKibbin Case.

In *Philadelphia and Reading Ry Co. v. McKibbin*, 243 U. S. 264 (1917), one element brings the case a little closer to the present one. But not very much. In the *McKibbin* case cars of the defendant passed onto the tracks of the Central Railroad of New Jersey and were hauled by it into New York.

But the Reading locomotives did not go to New York. Neither did its crewmen.

If the Reading received any compensation for the use of the freight cars, we assume that was the fixed daily rental that we understand is regularly charged for cars away from their home lines. The opinion makes it clear that so far as freight and passenger revenues are concerned the Reading received nothing except what was earned on its own tracks. It did not share, as National Airlines does, the risk of lack of business or the hope of profit when business was good on the lines of its connecting carrier.

Thus the present case is very different from the *McKibbin* case. There is far more activity to support the Court's jurisdiction than there was there.

—No Issue as to Present Validity of Green and McKibbin Cases.

On the facts of the present case, therefore, it is impossible for this Court to issue a binding rule as to the present validity of the *Green* and *McKibbin* cases. Anything it chose to say on this question would be sheer dictum.

—The Bodinger Case.

The petitioner gives a partial quotation from *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176, 181 (1955):

> "* * * this court has urged alertness to resist 'extension * * * of jurisdiction * * * in the Federal system' * * *" (Pet. 7.)

The full sentence thus abbreviated from the *Bodinger* case is as follows:

> "It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the Federal system."

Petitioner urges that "the decision below foretells substantial enlargement in the diversity jurisdiction of the Federal courts."

We gather that the Circuit Court felt that to accept the petitioner's arguments would be an unauthorized reduction of jurisdiction in the Federal system.

To say, as petitioner says (Pet. 7), that the Circuit Court's decision:

> "authorizes suits against rail carriers and airlines, not only where they operate, but wherever their equipment and goods travel under lease over connecting lines and wherever business over their lines is solicited by a connecting carrier"

is to ignore the facts we have outlined above.

—The Davis Case.

Another instance of convenient omission occurs in the petitioner's quotation (Pet. 7) from *Davis v. Farmers Co-operative Equity Co.*, 262 U. S. 312, 317 (1923). The full quotation is as follows, the words omitted by the petitioner being italicized:

> "Ordinary effective administration of justice does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, *and in which the plaintiff does not reside.*"

Thelma Scholnik sues as a resident of Ohio.

If this is not a sufficient distinction, note that the word of Mr. Justice Brandeis in this quotation is "*re-*

quire." This is very different from "permit." The word "require" was chosen advisedly because in the *Davis* case the Court was considering whether justice required a burden upon interstate commerce that it found was imposed by a Minnesota statute that abrogated the *Green* case. No issue has been raised in our present case of burden upon interstate commerce. We are concerned with what suits justice permits, not what it requires.

—The Bank of America Case.

Petitioner cites *Bank of America v. Whitney Central National Bank,* 261 U. S. 171 (1923), in which constructive presence through agents was held not to support a court's jurisdiction. This too is readily distinguished on its facts, for the defendant had no place of business in New York that it held out as its own and its employees were not regularly present in New York, as National's are in Ohio. Moreover, what the Court regarded as the corporation's incapacity to be present through agents seems inherently contradictory to the modern understanding that a corporation cannot act except through agents, and the well founded statement of the Court of Appeals in the present case that:

> "With respect to a corporation, its presence without the state of its origin is manifested only by activities carried on in its behalf by those who are authorized to act for it." (Pet. 26, 27.)

—The District Court Cases.

Citing many District Court cases (Pet. 12, 13), petitioner urges that this Court should issue the writ sought in order to declare the law authoritatively on *Green* and *McKibbin,* and thus prevent a vast waste of effort and an even vaster confusion and uncertainty that the petitioner

paints into its picture of the present state of the law. If it could achieve such a result, this Court should make haste to do so. But so far as this case is concerned, we submit the Court can make haste only by waiting for a better one. This is so not only because the facts here would not support a ruling on *Green* and *McKibbin,* as we have shown above, but it is so also because the "ever-vexatious," "oft-litigated but never settled," "difficult," and "thorny" state of the law on jurisdiction over foreign corporations is inherent in the facts. For wherever the jurisdictional lines are drawn there are bound to be borderline cases. Even the rules of "mere solicitation" and "solicitation-plus" produced much litigation. The yearning for simplicity is a natural one, but simplicity cannot be achieved in a complex economy. Thus the cases cited by petitioner on pp. 12 and 13 of its brief nearly all turn upon their facts. Many of them recognize the fact that the *International Shoe* case, 326 U. S. 310, and others following it, have modified the law, but hold simply that the facts did not fall within even the enlarged—if it is enlarged—area of jurisdiction. Few, if any, of those cases would have been decided differently, we submit, even by the Circuit Court whose ruling is now sought to be reviewed.

We agree that

> "the machinery of the law ought to be so sure and certain that litigant and counsel may know what court is open to them." (Pet. 15.)

But the present case is not a likely instrument to make it so.

CONCLUSION.

This case brings for review a decision clearly supported by the facts of the case.

While there are some areas of uncertainty in the law on jurisdiction over foreign corporations, the facts here do not fall within those areas.

This is not an appropriate case in which to attempt clarification.

The writ should not issue.

Respectfully submitted,

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